STATE OF MICHIGAN
SUPREME COURT
Appeal from the Michigan Court of Appeals
[Kelly (M.J.), PJ., Cavanagh and Servitto, JJ.]

KIMBERLY MARIE MARIK,

Plaintiff/Appellee,

-vs-

PETER BRIAN MARIK,

Defendant/Appellant.

Supreme Court No. 154549
COA No. 333687

Macomb Circuit Case No. 2011-0651-DM
Hon. Kathryn A. George

/

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APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Appellee accepts Appellant's statement of jurisdiction.

COUNTERSTATEMENT OF NATURE OF ORDER APPEALED AND RESPONSE TO APPELLANT'S ALLEGATIONS OF ERROR

This is yet another application for leave seeking review of the issue settled in *Ozimek v Rodgers*, ____ Mich App ____ (2016), 2016 WL 4482938, on August 25, 2016 in the opinion on remand from this Court—whether a postjudgment order resolving a school-choice dispute is appealable of right as an order "affecting custody." It is, moreover, a particularly poor vehicle for review of the jurisdictional issue, even if this Court were interested in addressing the question, because Appellant Peter Marik ("Father") had previously abandoned his request for the school of his choice, allowed the children for *four years* to attend the more convenient school near Appellee Kimberly Marik ("Mother") where the children live most of the time, and then belatedly attempted to resurrect his request with virtually no evidence that it was in the children's best interests to pull them from a school in which they were thriving.

The Court of Appeals dismissed this appeal for lack of jurisdiction on July 12, 2016 in a one-judge administrative order. Rather than seek immediate review here, Father sought reconsideration from a COA panel, which delayed the application to this Court until October 10, 2016 (after the start of the children's school year). As noted, the published opinion on remand in *Ozimek* was entered on August 25. In both *Ozimek* and this case, delayed applications for leave to appeal have now been filed below, seeking review of the trial court decisions on the merits of the school choice issue. *Ozimek* is COA 335459; *Marik* is COA 336087. There is no need for this Court to intervene, since both appellants will have appellate review of their issues.

The Court of Appeals in *Ozimek* correctly settled the issue raised in this application. A small group of family law appellate attorneys—committed in their belief that all postjudgment orders that may "affect" (in the broadest sense) either legal or physical custody need to be appealable by right, not just by leave—has apparently decided that this Court may view their

request more favorably if more applications are filed. Hence this application. The *Ozimek* decision appropriately held that the broad interpretation of MCR 7.202(6)(a)(iii) advocated by Father and the amici curiae would allow every disputed decision of joint custodians to be appealable of right and that such an interpretation is contrary to the plain meaning of the court rule, not to mention profoundly impractical.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly dismissed Father's appeal by right of an order denying his second motion addressing the minor children's school because (1) the Court of Appeals correctly held in *Ozimek v Rodgers* that a denial of a motion to change a child's school is not appealable by right under MCR 7.202(6)(a)(iii) and because (2) regardless of the outcome of *Ozimek* in this Court, the trial court's denial of Father's second motion addressing the children's school, which was substantially similar to his first motion on the same subject, was not appealable by right because Father withdrew his objections to the Friend of the Court referee's first findings and first recommended order and stipulated to the dismissal of the scheduled evidentiary hearing on his first motion?

Plaintiff-Appellee: Yes

Trial Court: Did not address

Court of Appeals: Yes.

Grounds for Denying Appellant's Application for Leave

The Court of Appeals, as directed by this Court, addressed whether an order denying a motion to change schools is appealable by right under MCR 7.203(A) and concluded that it is not because "an order denying a motion to change schools is not an order affecting the custody of a minor within the meaning of MCR 7.202(6)(a)(iii)." *Ozimek v Rodgers, supra* at 4. The Court of Appeals opined that "the addition of legal custody in the custody definition in MCR 7.202(6)(a)(iii), as championed by plaintiff, would so broaden the court rule that few, if any, postjudgment orders in domestic relations cases would be exempt. With regard to a change in schools, this issue could arise every new school year." *Id.* An application for leave to appeal the *Ozimek* decision is pending in this Court and a delayed application for leave on the merits is pending in the Court of Appeals.

The Court of Appeals, also as directed by this Court, addressed whether a postjudgment order for makeup parenting time is appealable by right under MCR 7.203(A) and similarly concluded that it is not because "[h]ad our Supreme Court intended that parenting time orders be appealable by right, it would have included parenting time in the court rule." *Madson v Jaso,* ____ Mich App ____ (2016), 2016 WL 4482946, at 5. The Court of Appeals declined to read "parenting time" into the plain language of the rule and concluded that it lacked jurisdiction over the provisional postjudgment order for makeup parenting time, and accordingly, dismissed the *Madson* appeal. *Id.* An application for leave to appeal the *Madson* decision is also pending in this Court in addition to the delayed application for leave on the merits pending in the Court of Appeals.

In these two published opinions, the Court of Appeals, as directed by this Court, unequivocally held that the issues raised by Father in this case are not appealable by right. In

light of these decisions on jurisdiction, the Court of Appeals properly dismissed Father's appeal of right. Father's attempt to bundle this appeal with *Ozimek* and *Madson* to create an appearance of an issue that is jurisprudentially significant should not prevent the denial of this application. Here, Father withdrew his objection to the Friend of the Court referee's rulings and recommended order on his first school-choice motion, waited four years, and then re-filed essentially the same motion. This case is a very poor vehicle for addressing the jurisdictional issue raised because the underlying motion is completely without merit. A grant of leave or even an abeyance order would unnecessarily engender uncertainty for the children and their mother. The Court of Appeals is likely to have decided the merits before or at about the time this Court deals with the applications in *Ozimek* and *Madson*.[1] As the Court of Appeals opined in *Ozimek*, allowing appeals of right of every decision which arguably touches on legal custody is too far reaching.

Father lists a host of cases recently filed in this Court in his "Grounds for Appellant's Application for Leave to Appeal" section in support of his claim that the issue he raises—the inconsistent interpretation of "affecting custody" under MCR 7.202(6)(a)(iii)—is a recurring theme. The cases cited by Father, however, have no resemblance to the issue here, which is Father's attempt to appeal his second motion addressing the children's schools. *Gregerson v Gregerson*, 498 Mich 951 (2015), involved an award of attorney fees and the jurisdictional issue was whether the order was appealable of right before the trial court determined the amount of the sanction; there were no minor children in *Gregerson* or other issues involving or affecting custody; *Varran v Grannaman,* 497 Mich 929 (2015), involved grandparenting time. *Bolz v Bolz*,

[1] Because the order pending in the delayed application (COA 336087) is postjudgment, a denial of leave is functionally a decision on the merits. The Court of Appeals typically denies such applications "for lack of merit in the grounds presented."

495 Mich 986 (2014), involved a change of domicile. Moreover, any inconsistencies in the interpretation of MCR 7.202(6)(a)(iii) have since been addressed by the Court of Appeals in *Ozimek* and *Madson.* If this Court decides to grant the pending applications in either *Ozimek* or *Madson,* it should have no bearing on Father's application; the denial of a frivolous, harassing motion does not affect custody and therefore is not appealable by right.

Counterstatement of Facts

A. The Judgment of Divorce

The parties were divorced pursuant to a Consent Judgment of Divorce dated October 21, 2012 (the "Judgment"), which granted the parties joint legal and joint physical custody of their twin sons, born June 6, 2007. The Judgment further provides that the "primary residence" of the minor children vests with Mother. Judgment at 3. Since Mother filed for divorce, six different attorneys have represented Father in the trial court and Father has also represented himself. Father has filed six post-judgment motions, two regarding the children's school. The other motions addressed reinstating Father's overnight parenting time after it was temporarily suspended, obtaining passports for the minor children, foreign travel and repeated requests for counseling for the boys. If Father's position is accepted, all these rulings would have been appealable by right.

B. First School Motion

On July 16, 2012, Father filed his first motion regarding school for the minor children and specifically where the children would start kindergarten. Defendant's Motion to Determine School for Minor Children *et al.* dated July 12, 2012 ("First School Motion"). At the time, Mother lived in Farmington Hills, where she still lives, and given that her home is the boys' primary residence, she enrolled them in the public school assigned to her home, Kenbrook Elementary School in Farmington Hills. Father lived in Waterford but sought to have the boys attend Oak Ridge Elementary School, also a public school, in Royal Oak, where neither parent lived. Father argued that Royal Oak was more convenient than Farmington Hills based on where the parties lived and worked. *Id.* at ¶13. He argued that the parties were responsible for "an essentially equal" amount of drop-offs and pick-ups from school, which is not accurate. *Id.* at ¶4.

During the school year, Father has parenting time 6 out of 14 nights, 4 of which are school nights and Mother has parenting time 8 out of 14 nights, 6 of which are school nights. Judgment at 3-4. Oak Ridge is no longer convenient to Father's employment as Father frequently changes (loses) jobs, having held some 11 different jobs in the last 12 years. Accordingly, as discussed below, in his second school related motion, which is the subject of his application, Father seeks to enroll the boys in yet a different school.

Father also claimed that the Royal Oak School District would provide the children a better education. First School Motion, ¶15. He further argued that Royal Oak Schools would provide more stability as the children would be able to attend the same school through 5th grade and the school proposed by Mother stopped at fourth grade. *Id.* at ¶¶15, 16.[2] Father further argued that the Judgment did not specify if a parent had primary residence for school purposes. First School Motion at ¶5. This was also inaccurate as the Judgment specifically states that primary residence vests with Mother. Judgment, at 3.[3]

The First School Motion was heard by the Friend of Court referee who issued a recommended order that the children attend Kenbrook. Father timely objected to the recommended order. On August 27, 2012, the trial judge held a de novo hearing and set the matter for further evidentiary hearing before the referee and also held that in the interim, the children would begin school in the Farmington Hills School District at Kenbrook Elementary

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2 Kenbrook no longer stops at fourth grade. As such, Father's stability arguments support the court's decision that the boys should remain at Kenbrook.

3 In arguing Father's second motion addressing school, Father's third lawyer post-judgment and sixth lawyer in the trial court confirmed that awarding mother "primary residence" related to "school district and school choice." 6/13/16 Tr. at 5. Father's attorney further argued that primary residence language is "typically put in a judgment of divorce in my experience at least in reference to school selection or simply to make one parent feel more comfortable with the settlement." *Id.* at 5. Father now takes a contrary position in the application filed in this Court. Application at 10.

School. Order After De Novo Hearing Adopting Recommended Order in Part and Setting Evidentiary Hearing dated August 27, 2012. On October 12, 2012, four days before the scheduled evidentiary hearing, the parties signed a stipulation to dismiss the evidentiary hearing pursuant to which Father withdrew his objections to the recommended order and the evidentiary hearing was canceled. Father's claim at page 11 of his application that he withdrew the First School Motion is incorrect; he withdrew his objections to the recommended order. As such, the recommended order of the referee became the order of the court and the children remained at Kenbrook Elementary School. MCL 552.507; MCR 3.215.

C. The Children Are Thriving at Kenbrook; Father is Not.

The children are thriving at Kenbrook Elementary School; there is no reason to change their school. Plaintiff's Response to Defendant's Motion to Modify Parenting Time and to Change School of Minor Children dated April 27, 2016, ¶3. Mother maintains that Father seeks to change the children's school because he was banned from Kenbrook due to his aggressive, bizarre and manipulative behavior. *Id.* at ¶6. Specifically, in February 2016, the principal restricted Father's access to the playground during recess for swearing at children on the playground. *Id.* This was not the first time that Father exhibited aggressive and inappropriate behavior at the school as noted by the principal. *Id.*

D. Second School Motion.

Despite the children thriving at Kenbrook, on April 19, 2016, Father hired his third postjudgment lawyer (sixth lawyer since Mother filed for divorce) and filed Defendant's Motion to Modify Parenting and to Change School of Minor Children ("Second School Motion"). In his Second School Motion, Father seeks a modification of parenting time to award him equal parenting time, which he alleges does not change or affect the established custodial environment

of the children. Second School Motion, ¶12.[4] He also seeks to have the children attend Our Lady of Refuge in Orchard Lake for substantially the same reasons that he sought to have the children attend Oak Ridge Elementary in 2012.

Father concedes that he still lives in Waterford, albeit now with his third wife and 15 year old stepdaughter, and that Mother still lives in Farmington Hills where the children attend school. Father also concedes that the primary residence vests with Mother under the parties' consent judgment and the "primary residence" refers to school district and school choice. 6-13-16 Tr. at 5. Nevertheless, he argues that the boys should transfer out of the Farmington Hills school district and the school they have been attending since kindergarten. Father claims that Our Lady of Refuge is a better school than Kenbrook, just as he claimed that Oak Ridge was a better school than Kenbrook, and that Our Lady of Refuge has fewer problems than Kenbrook. Second School Motion, ¶¶16, 22. He now claims that Our Lady of Refuge is more convenient and equal distance from both parties' homes, just as he previously claimed that Oak Ridge was more convenient considering the parties' respective residences and places of employment. *Id.* at ¶19.

Then to bolster his argument that the children should change schools, Father claims that the children's performance in school had been average "but by no means exceptional" and that the children have experienced bullying which the Kenbrook staff appeared to be ill-equipped to address. *Id.* at ¶¶17-18. Neither of these claims was substantiated. To the contrary, Father attached old test scores to his motion rather than current test scores showing that both children tested above the national average, with Everett scoring a full 10 points higher than the year

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[4] In his Brief in support of his Second School Motion, Father argued that he was not seeking a change in custody, merely a modification of parenting time. In this Court, he *does* allege—without development—that the parenting time change would "affect custody" for appellate jurisdictional purposes. He also contends that Mother, in the trial court, "admitted" that the change would affect custody. *Madson* has settled this issue as to most parenting time orders.

before. Plaintiff's Response to Second School Motion, ¶17. Mother denied in her response that the children had been bullied. Recall, it was Father who swore at other children on the playground and was therefore banned from the playground during recess. Mother testified that, "There was an incident at school. The principal communicated to both of us about it, and there was no mention of bullying. The term 'bullying' comes from Mr. Marik. The term 'bullying' has never come from the school, and has never been proposed by the school that bullying has been going on." 6/13/16 Tr. at 28.

E. The Friend of the Court Referee Denies the Second School Motion.

The Friend of the Court referee heard Father's Second School Motion on May 2, 2016. The referee took testimony and considered the exhibits offered by the parties before denying both the request to modify parenting time for lack of material change in circumstances and the motion to change schools for lack of good cause shown "as the testimony indicates the children are progressing in a satisfactory manner at their current school and that their current school will not be closing in the foreseeable future." Recommended Order dated May 2, 2016. Once again, Father timely objected.

F. The Trial Court Denies the Second School Motion.

The parties appeared before the trial judge on June 13, 2016. At the hearing, Father's attorney confirmed that "[t]here has been no testimony or allegation asserted by my client [that the children] are doing poorly academically." 6/13/16 Tr. at 8. Still, he argued that Father *believes* that the children *could* be doing better in a different school. *Id.* The court repeatedly asked what had changed since Father filed the First School Motion. The court considered the children's report cards and the various emails the parties presented as well as Father's reports about the school district.

> THE COURT: The change in circumstances, the reason why I asked you is he seems to pivot a lot on the fact that he is married, remarried and that changes the circumstances.
>
> Otherwise I don't see your argument in any fashion benefiting the children. The children are doing well in school. They are thriving. There seems to be no issue with the children.
>
> MR. CHRYSSIKOS [attorney for Father]: I'm not aware of any evidence that the children are thriving in school. They are doing passable. They are doing–
>
> THE COURT: If they weren't thriving I'm sure you would have pointed that out.

Id. at 11.

The court also swore in the parties and took testimony. As such, the trial court considered argument, testimony and the parties' exhibits before ruling, including evidence about Father's propensity to lie and mislead. Most of Father's complaints about the current school were generic complaints about the school district, not specific complaints about Kenbrook or experiences the parties' children were having. The court properly found that anticipated problems should not be the basis for changing the children's school. "But you are anticipating problems with the school system. And I agree with [Mother's attorney], find a school system that doesn't have some issues." *Id.* at 33. The court further found that Father gave up his argument by withdrawing his objections to the first recommended order and "so the children are established in this school." *Id.*

In response to Mother's request for attorney fees, which the court reserved, Father argued that the Second School Motion was filed in good faith. The court did not agree. "I don't completely agree that it was a good faith argument frankly I think that he concocted part of it.... I don't know if it is driven by child support. I don't know if it's driven by desire for control, but I'm not impressed with it all." *Id.* at 35-36. The court repeatedly asked why Father stipulated to the dismissal of the evidentiary hearing on the First School Motion. *Id.* at 36. His attorney finally answered, qualifying that he was not the attorney of record then. "My understanding was that the

children had already been enrolled in the school, had already begun school in the fall, and he did not have a desire to pull them out of the school at the time." 6/13/16 tr. at 36-37. There is similarly no reason to pull them out now.

ARGUMENT

This Court Should Deny Leave Because the School Choice Order Did Not "Affect Custody" Under *Ozimek* and *Madson* and Because the Court of Appeals Will Decide the Merits of Father's Appeal When it Resolves the Pending Delayed Application.

A. The standard of review is de novo.

Whether the Court of Appeals has jurisdiction over an attempted appeal of right is a pure question of law, reviewed *de novo* by this Court. The jurisdiction of the Court of Appeals is provided by law, and its practice and procedure are prescribed by the court rules and this Court. Const 1963, art. VI, §10; MCL 600.308; MCR 7.203 and 7.202(6). Unlike this Court or the circuit court, the jurisdiction of the Court of Appeals is "entirely statutory," *People v Milton*, 393 Mich 234, 245 (1974), and generally is limited to final judgments and orders. MCL 600.308. Interpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo. *Marketos v American Employers Ins. Co.,* 465 Mich 407, 413 (2001).

B. MCR 7.202(6)(a)(iii) should not be interpreted to allow every joint legal custody decision to be appealable by right.

The well-established rules governing the construction of statutes apply with equal force to the interpretation of court rules. *McAuley v General Motors Corp.*, 457 Mich. 513, 518 (1998), *citing Smith v Henry Ford Hosp.,* 219 Mich App 555, 558 (1996). When the plain language of a court rule is unambiguous, the expressed meaning is enforced without further judicial construction or interpretation. *CAM Const. v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 554 (2002) *citing Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135 (1996). "Statutes

should be construed so as to prevent absurd results, injustice, or prejudice to the public interest." *McAuley, supra,* citing *Franges v General Motors Corp,* 404 Mich 590, 612 (1979).

> The Court of Appeals in *Ozimek* addressed preventing absurd results.
>
> > As noted, before the 1994 amendment, MCR 7.203 did not restrict appeals by right in domestic relations matters. The amendment limited claims of appeal such that the only postjudgment orders in domestic relations cases appealable by right are those involving the custody of minors. When the Supreme Court amended the rule in 1994, it clearly intended to limit orders appealable by right. To interpret the court rule as appellant proposes would be counter to that obvious intent. Reinforcing that conclusion is the fact that the court rule does not expressly indicate that it includes the concept of "legal" custody. Had the Supreme Court intended for the court rule to include "legal" custody, it would have included the term. Absent that specific language, this Court should not broadly interpret the court rule.

Ozimek, supra at 3-4. The Court of Appeals further opined that using legal custody as a basis for its jurisdiction would permit a far-reaching array of cases to be appealed by right, allowing parents to challenge orders that change the home environment in any way. "Legal custody could be implicated in countless decisions regarding a child, such as which vaccinations a child should receive, which parent should pay for a psychologist fee, which daycare center a child should attend, which party should pay for the child's transportation to parenting time, or whether the child should be enrolled in football." *Id.* Here, Father, a serial motion filer, argues for such a broad interpretation.

MCR 7.202(6)(a)(iii) reflects a policy decision that a certain class of significant judgment-modifying orders are important enough to be appealable of right. The *Ozimek* decision, consistent with the principles of interpreting court rules according to the expressed meaning, says that this exception to the general rule of appeals-only-by-leave-after-judgment has to be narrowly construed to ensure that the orders permitted to be appealed of right meet a threshold of significance. In ordinary parlance, when people use the word "custody," they are referring to

where the children mostly live or physical custody; they aren't referring to decisions about where children attend school or which soccer team they play for. If every case strictly involving "legal" custody decisions like school, religion, medical care is appealable of right the exception swallows the rule which leads to the absurd result that "final order" has no meaning in domestic relation cases.

Proponents of broader custody jurisdiction, including Father and the amici curiae, argue as though it is an appeal of right or nothing, which plainly is not true. Most joint legal decisions are so time-sensitive that even the priority given to custody cases on appeal generally would not be fast enough to timely address the issue. Such appeals of right would still need to be coupled with a motion for immediate or extra-expedited treatment, making them functionally the equivalent of applications for leave coupled with a motion for immediate consideration. Not only is the availability of an application for leave appellate recourse, it is the kind of recourse that, in substance, parties are going to be seeking most of the time, whichever kind of appeal they file, confirming that the *Ozimek* rule is a workable one and should be left alone.

Father's argument that school decisions have been treated inconsistently was squarely addressed in *Ozimek*. The *Ozimek* court found that when a parent was afforded an appeal of right with regard to a school decision, it was because the decision affected the amount of time the parent spent with the child, including changing the child's school from home schooling to public school, *Parent v Parent*, 282 Mich App 152 (2009), or moving the child to a school district a considerable distance away, *Pierron v Pierron*, 282 Mich App 222 (2009), *aff'd* 486 Mich 81 (2010). "In contrast, the trial court's decision [in this case] did not impact the amount of parenting time or the number of overnights with either parent." *Ozimek*, *supra* at 3. Here, too, the trial court's denial of Father's Second School Motion did not impact the amount of parenting

time or the number of overnights with either parent. This is consistent with the holdings in *Wardell v Hincka*, 297 Mich App 127 (2012), denying change of custody, and *Rains v Rains*, 301 Mich App 313 (2013), denying change of domicile, that only an order that has an effect on and influences where the child will live "affects custody".

The *Madson* decision also addresses the far reaching consequences of allowing all disputes between joint custodians to be appealable of right.

> The utilization of legal custody as a basis for this Court's jurisdiction for a claim of appeal by right broadens the definition of custody. An expansive definition could include all manner of decisions regarding the child, allowing appeals by right to be taken from decisions, for example, whether to allow a child to attend one specific summer camp over another; whether to allow a child to participate in travel soccer; whether one parent or the other would pick up the child from school; or from decisions regarding "how to treat the child if he is not feeling well; whether to expose the child to religion and religious practices; and to what persons, television programs, and movies to expose the child," *Varran,* 312 Mich. at 607. An extension of this Court's jurisdiction to incorporate legal custody would so expand the rule as to nullify the qualifying language "affecting the custody of a minor." To extend the court rule to encompass all postjudgment decisions regarding minors in domestic relations appeals would be to return to the jurisdictional standard before the amendment of the court rule

Madson, supra at 5. The decision here—to keep the children in the school where they are thriving—would be appealable by right every year if the rule is interpreted as Father argues.

Father's second motion also requested a modification of parenting time, from six overnights in 14 days to seven. Father, however, makes no argument in his application that this change would be significant enough to "affect custody," even under the broad construction the application contends for. Father concedes that not all changes in parenting time "affect custody." He cites *Rains*, the change-of-domicile case, for the proposition that an order *can* affect custody if it would "substantially reduce the time a parent spends with a child" because it might change the established custodial environment. Application at 15. And he cites other cases for the proposition that if one parent "is relegated to the role of 'weekend parent'," there may also be a

change in the established custodial environment. *Id.* But nowhere does Father suggest that the parenting change *he* requested would or even might "affect custody" under MCR 7.202(6)(a)(iii) and the cases he relies on. In short, he does not actually contend that the Court of Appeals was wrong to dismiss his appeal of the parenting time decision for lack of jurisdiction.

Accordingly, Father has abandoned parenting time as a basis for his application. "A party may not merely announce a position and leave it up to this Court to discover and rationalize the basis for the claims and then search for authority." *Mudge v Macomb County*, 458 Mich 87, 105 (1998), quoting *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959). As *Mitcham* put it in 1959 and this Court reiterated in 2014, "The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Wayne County Employees Retirement System v Wayne Charter County*, 497 Mich 36, 41 (2014). *See also In re Certified Question from the US Court of Appeals for the Ninth Circuit (Deacon v Pandora Media, Inc)*, 499 Mich 477, 485 n.12 (2016).

With respect to parenting time, Father really is asking this Court for an advisory opinion on jurisdiction in a case that does not present the issue. There must be an actual case or controversy that raises the legal issue on which review is sought; that is the underlying basis of, for example, Chief Justice Young's "constitutional reservations" about whether certified questions should be addressed by the Court. *Certified Question*, 499 Mich at 489. Only then can the Court trust that the lawyer's advocacy will adequately flesh out the legal issue in a concrete factual setting.

C. Even Father Argues There Should Only Be One Appeal of Right.

Father waived any appeal of right he may have had. For this reason, this case is not an appropriate case for determining if a school decision "affects custody". Father initially objected

to the Friend of the Court Referee's recommended order denying his First School Motion and the trial court agreed to grant him an evidentiary hearing on the issue. Father then withdrew his objection and stipulated to the cancelation of the hearing. The 2012 recommended order that the children attend Kenbrook became the order of the court. MCL 552.507; MCR 3.215. This was precisely the issue in *Mellema v Mellema,* 2016 WL 1612802 (unpublished), one of the cases relied upon by Father. In that case which predates *Ozimek* and *Madson*, the Court of Appeals held that if a party could appeal as of right an order granting in part or denying in part a motion to change school districts, the party had to appeal the first final order. *See also, Surman v Surman*, 277 Mich App 287, 294 (2007) ("a party cannot wait until the entry of a subsequent final order to untimely appeal an earlier final order").

Even Father recognizes that a parent should not be allowed to annually file for a change a school district to be followed by an appeal of right each year. Father argues at page 18 of his application that he should be afforded at least one appeal of right on the choice of school issue. Even if that were true, Father waived the right he contends for when he withdrew his objections in 2012 and agreed to the boys remaining in Kenbrook. Father also recognizes a subsequent motion should be based "on an entirely new set of facts and circumstances." Application at 18. Here, the trial court correctly found that the changes alleged by Father in support of his request involved Father and not the children. 6/13/16 Tr. at 12.

Again, however, Father's plea for appellate recourse completely ignores the fact that he *has* appellate recourse and, indeed, is utilizing it with his delayed application for leave to appeal in the Court of Appeals. Father should have filed an application for leave promptly after the trial court's decision, before the start of the school year. The Court of Appeals would have recognized that its decision whether to review that postjudgment order was effectively "final" for that school

year. If it had denied review, Father would now be seeking leave to appeal a decision on the merits in this Court, not still quarreling over a threshold procedural issue.

RELIEF REQUESTED

Father's application itself illustrates why the jurisdictional rule he advocates for should be rejected. At the end of the "Grounds" section, the application says, "Determining whether an order falls within MCR 7.202(6)(a)(iii) is not a straightforward endeavor....[T]he question...can be complicated." Application at 3. Father would have this Court amend the exception in some convoluted way or explain it at length in an opinion. But determining jurisdiction already is a "straightforward endeavor" under *Ozimek* and *Madson*. The order appealed must resolve a motion that, if granted, would have a nontrivial impact on *physical* custody. Appellate jurisdiction, even more than many other legal issues, cries out for a bright line test that can readily be applied to any set of facts by bench and bar alike. The application should be denied.

Respectfully submitted,

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